# EMPLOYMENT TRIBUNALS

**Claimant:** Mr M Dowding

**Respondent:** The Character Group PLC

**Heard at:** London South **On: 27 January 2025**

**Before:** **Regional Employment Judge Khalil sitting with members**
**Mr Shaw**
**Mr Clay**

**Appearances**

For the claimant: in person
For the respondent: Mr J Laddie KC, Counsel

# RESERVED JUDGMENT ON COSTS ON REMISSION FROM THE EAT

## Unanimous Decision:

Upon consideration of the two issues on remission from the EAT, the Tribunal unanimously concludes:

1) The respondent's application for its award for Costs to be assessed on an indemnity basis is well founded and succeeds.

2) The respondent's application for the claimant to pay its costs of the Costs Hearing, limited to £20,000, is well founded and succeeds.

## Reasons

1. This was a public Hearing on remittal from the EAT in relation to 2 discrete issues which will be referred to below.

2. The claimant appeared in person, the respondent was represented by James Laddie, KC

3. The case has a significant history. Following a substantial Liability Hearing, the claimant's claims for Unfair Dismissal under S.98 Employment Rights Act 1996 ('ERA'), Dismissal for making a Protected Disclosure under S.103A ERA, detriments for making a Protected Disclosure under S. 43B/47B and for Breach of Contract were all dismissed. The decision was promulgated on 12 November 2020.

4. The respondent applied for its Costs of the Liability Hearing. Following a Costs Hearing, the Tribunal awarded the respondent £127, 563.20 (representing 21% of the respondent's total costs), subject to detailed assessment on an indemnity basis. The Tribunal also awarded the respondent £20,000 in respect of the respondent's Costs of the Costs Hearing. The Tribunal recorded the respondent's total Costs (for the Costs Hearing) to be £28,000. The decision in relation to both awards was promulgated on 20 January 2022.

5. The claimant appealed against the Liability and Costs decisions. The EAT's Judgment and the EAT's Order were sealed on 24 September 2024.

6. The appeal against the Liability Judgment failed. The appeal against the Costs decision also failed save that the EAT remitted the following 2 issues only:

    - Whether the Tribunal applied a higher bar when concluding that an award of costs on an indemnity basis was warranted and if it did, what particular features led it to that further conclusion (paragraph 159 of the EAT Judgment) ('Issue 1 on remittal')

    - Whether the Tribunal considered, having regard to the nature, gravity & effect of the relevant conduct, an award of £20,000 was appropriate in relation to the Costs of the Costs Hearing and if it did, to properly reason or explain its decision (paragraphs 169 & 171 of the EAT Judgment) ('Issue 2 on remittal')

7. It was discussed at the Hearing that there was possibly some tension between the extracts of the Judgment (above) and other parts of the Judgment and/or the Order of the EAT directing *fresh* consideration of the basis of assessment of the main Costs award and the amount of the 'costs of costs' award. Both parties were agreed that the Tribunal could look at both issues afresh.

8. The EAT Judgment did refer in paragraph 174 that the Tribunal would need to decide *afresh* whether assessment of the main costs award should have been conducted on an indemnity basis, further that the Tribunal would need to decide *afresh* the Costs of the Costs award.

9. Further, in paragraph 175, in rejecting the claimant's submission for remission to a different Tribunal, the EAT said even if remission was to a different panel, the original panel's reasons for its main decisions would still form the *starting* point. In addition, the EAT added the existing panel would be better placed to consider, *afresh*, the two very limited matters being remitted for *fresh* determination.

10. Finally in paragraph 176, the EAT said it was directing that *fresh* consideration of the basis of assessment of the main Costs award and the amount of the 'Costs of Costs' award be remitted.

11. In advance of this Remitted Costs Hearing, the claimant also applied for the Hearing to be postponed, pending an asserted application for leave to appeal. He also applied for Reconsideration of both the Liability and Costs decisions. Both applications were refused by the Tribunal's letter dated 22 January 2025.

12. The Tribunal had Ordered, on 29 October 2024, both parties to exchange written submissions limited to a maximum of 10 pages each. The Order was repeated on 22 January 2025 as neither party had complied with the limit. The respondent's skeleton argument ran to 12 pages, the claimant's was vastly excessive at 39 pages.

13. The Tribunal was provided with the following documents:

- A skeleton argument from the claimant running to 39 pages – The Tribunal allowed the document, notwithstanding the claimant being and remaining in breach of the Tribunal's Order.

- A skeleton argument from the respondent – initially 12 pages, reduced to 10 pages following the Tribunal's letter of 22 January 2025.

- A Core Bundle running to 118 pages

- The respondent's supplementary Bundle running to 22 pages

- The claimant's supplementary Bundle running to 485 pages

- The respondent's authorities Bundle
- The claimant's authorities Bundle.

14. At the outset of the Hearing, the Tribunal having undertaken some reading in, had to raise a potentially serious issue. The Tribunal discussed with the parties its provisional view that the transcript of the Costs Hearing in the claimant's supplementary Bundle appeared to be taken from a Recording of that Hearing. The claimant asserted that the Tribunal had given permission for the transcriber to use software, from which the transcript had been produced. The Tribunal could not recall a discussion about this. The respondent recalled a discussion at the Costs Hearing but said it was only about transcription (of the notes of the Hearing), not about recording the proceedings. The claimant was not prepared to accept the proceedings had been recorded without permission. The matter was extremely important as the claimant was potentially in contempt of Court. The matter was not taken further at the hearing itself, instead the Tribunal committed to writing to the parties about this and any next steps and returned to the matters pertaining to this Hearing. This will form the subject of separate communication with the parties.

15. The claimant and Mr Laddie, KC addressed the Tribunal with oral submissions to advance/further their skeleton arguments.

## ***Issue 1 on remittal***

16. The Tribunal's first task was to consider whether the higher bar was met in relation to the award of Costs on an indemnity basis and if it was, what further features led the Tribunal to that conclusion.

17. The starting point of the Tribunal's analysis was its own initial conclusions.

18. In paragraph 74 of the Tribunal's decision in respect of the respondent's main costs application, the Tribunal awarded the respondent costs on an indemnity basis for the reasons set out in paragraph 65 of that decision.

19. Paragraph 65, cross referred back to paragraph 119 of the Liability decision wherein, the Tribunal had found, for multiple reasons, that claimant did not have a subjective belief in the alleged protected disclosure he was relying upon – put differently he knew he was not making a protected disclosure in the public interest. It was however, the bedrock of the claimant's claim.

20. That conclusion of the Tribunal was critical and provided the foundation upon which the Tribunal's further *directly related* conclusions were made as set out below.

21. The Tribunal concluded in paragraph 66, that the reference to a protected disclosure was only raised after dismissal and even then, not even in the context of the alleged protected disclosure which formed the basis of the claimant's claim in the litigation.

22. In paragraph 67, the Tribunal concluded that the whistleblowing claim was the main claim and the reason why the claimant was submitting escalating and considerable schedules of loss to remove the statutory cap for ordinary unfair dismissal.

23. In paragraph 70, the Tribunal concluded that the pursuit of the whistleblowing claims by the claimant was the main reason why the claim had not been capable of a commercial resolution. The offer of £200,000albeit holistic, was declined by the claimant at which time the respondent had said the whistleblowing claims were wholly without merit. It was also the main reason why the case was listed for so long, why there were so many witnesses and why there was such a vast amount of documentation and witness evidence. The overwhelming share of preparation was because of the whistleblowing claim.

24. The respondent's written application for costs stated that the claimant's claims were considered to be contrived, in particular, the respondent placed emphasis on the lack of belief in the protected disclosures.

25. In its skeleton argument for the Costs Hearing, the respondent had stated that the claimant had contrived a whistleblowing case in a cynical and misconceived attempt to displace the statutory cap (on Unfair Dismissal) thereby enabling the claimant to claim the wholly unrealistic sum of £1,463,567.34. The Tribunal had noted in paragraph 26 of its Costs decision, the respondent's emphasis that paragraph 119 of the Tribunal's Liability Judgment (rejecting the claimant's subjective belief), was critical/really important in support of its application.

26. In ***Howman v The Queen Elizabeth Hospital UKEAT/0509/12***, the EAT said that costs should only be awarded on an indemnity basis in Employment Tribunals when the conduct of the party has taken the situation away from even that very limited number of cases in the Employment Tribunal where it is appropriate to make Orders for Costs.

27. Having regard to the above guidance, the features set out above, in the Tribunal's unanimous conclusion, crossed the threshold to make a costs award on an indemnity basis by some distance – the higher bar was met. It was, in the Tribunal's conclusion, one of those rare cases where indemnity costs were properly warranted.

28. Looking at matters afresh, in addition to the reasons cited above, the Tribunal, on remission, also had regard to its own conclusions in paragraph 71of its decision on Costs and the conclusion on the claimant's dishonesty under oath (in relation to disclosure) and unreasonably accusing multiple others of fabrication in furtherance of his own case and in so doing, causing or risking reputational or economic harm to them - see the Tribunal's conclusions in paragraphs 26, 29 and 30 of the Liability Hearing (relating to dishonesty and allegations of fabrication against Ms Nahal, Mr Shah & Mr Ragg) – the allegation against Ms Nahal was ambiguously abandoned and the allegations against Mr Shah and Mr Ragg, were only abandoned at trial and, consequentially, Mr Ragg was stood down.

29. With these additional features in mind, the Tribunal concluded that it left virtually no doubt whatsoever, that the higher bar for indemnity costs was met.

***Issue 2 on remittal***

30. The Tribunal's first task was to consider whether, having regard to the nature, gravity & effect of the relevant conduct, an award of £20,000 was appropriate in relation to the Costs of the Costs Hearing and if it did, to properly reason or explain its decision.

31. The starting point of the Tribunal's analysis was its own initial conclusions.

32. In paragraph 80, the Tribunal had referred back to the respondent's skeleton argument (paragraphs 15 and 22).

33. Paragraph 15 of the respondent's skeleton argument for the Costs of the Costs Hearing, raised four distinct criticisms of the claimant in relation to the Costs Hearing:

- First, the claimant's failure to comply with the Tribunal's Order for the claimant to provide a statement of means.

- Second, his baseless and serious allegation of undisputed complicity in withholding evidence against the respondent's Solicitor in an email dated 21 October 2021.

- Third, on 22 October 2021, the submission of a 48 page witness statement with exhibits totalling 331 pages, challenging the Tribunal's competency and attacking almost all findings of fact in the Tribunal's Liability Judgment.

- Fourth, on 25 October 2021, the submission of a further 97 pages of exhibits also with no relevance to the Costs Hearing.

34. Paragraph 22 of the respondent's skeleton repeated the flagrant disregard of the Order for the claimant to provide a statement of means aggravated by service of a 'tsunami' of irrelevant material. In addition, the respondent referred to the doomed and inherently unreasonable costs application of the claimant himself.

35. In relation to the claimant's own costs application, the Tribunal had said in paragraph 81 of its Costs decision that the claimant had inflated his own costs application to negate and detract from the respondent's costs application, not because it had any merit. Further, that the claimant had referred almost exclusively to the Liability Judgment being wrong, which was an improper basis to defend the costs application.

36. In paragraph 168 of the EAT's Judgment in these proceedings, HHJ Auerbach stated that the net effect of the guidance in ***Barnsley MBC v Yerrakalva 2011 EWCA Civ 1255*** and ***McPherson v BNP Paribas (London Branch) 2004 EWCA 569***, was that whilst the Tribunal did not need to identify a precise causal link between conduct and an award of costs and the amount of costs, it does need to give consideration to what effects the conduct had (as well as its nature and gravity) and causation is thus not irrelevant.

37. The above features had a causal link to the incurrence of Costs by the respondent. Substantial preparation was required to deal with vast amounts of irrelevant and unnecessary material. Mr Laddie made the point at this Hearing that everything the claimant sends needs to be read. The claimant's conduct in refusing to comply with the Tribunal's Order caused the Hearing to go into a second day. The claimant's costs application for the staggering sum of £99,000, was a separate strategy of attack by the claimant causing another sideshow. The claimant's cost claim was characterised by the Tribunal in its Costs decision (paragraph 79) as being hopeless, nonsensical and made in bad

faith. The claimant attempted to argue at this Hearing that the Tribunal had not concluded this, however paragraph 79 was clear.

38. These were clearly factors directly causing the incurrence of additional costs by the respondent.

39. In addition, however, the claimant's conduct during the course of the Costs Hearing was also culpable and blameworthy. The Tribunal refers to its own conclusion in paragraph 81 of its Costs decision in relation to the claimant's misleading evidence in submitting a valuation of his flat at a lower figure than he had paid for it 7 years before, without explanation and describing it as a 1 bedroom flat when he knew it was a 2 bedroom flat. Further, his evasiveness in relation to his savings.

40. The foregoing conduct as a whole and its totality was severe and grave; it was wilful, strategic and disingenuous.

41. Having regard to the that conduct of the claimant, the Tribunal determined that an award of £20,000 was warranted. It was noted by the Tribunal, that the respondent's actual costs were higher. The Tribunal had further noted that the respondent was limiting its claim for costs to £20,000. The Tribunal concluded that the discount from its actual costs sufficiently mitigated that there would have been at least some requirement to attend the Hearing on day one. However, having regard to the claimant's conduct being severe and grave, £20,000 of the respondent's costs was warranted.

42. Upon looking at the issue afresh, the Tribunal acknowledges its error in stating the respondent's actual costs only amounted to £28,000. They were in fact stated to be £35,702. This was the Tribunal's error. It is not disputed by the claimant that the respondent's asserted costs was this higher figure. Having regard to the respondent's correct actual costs, the Tribunal concluded at this Hearing that the award of £20,000 (and the respondent limiting its claim to that sum) was a significantly reduced percentage – only 56% against 71%, which operates to the claimant's advantage. With that in mind, the Tribunal was fortified in its conclusion that the award of £20,000 was just and proper having regard to the nature, gravity and effect of the conduct.

***A note on the claimant's conduct and submissions at this Hearing***

43. In the course of reaching its conclusions, the Tribunal observed that the claimant spent a considerable proportion of this Hearting inviting the Tribunal to use its discretion *against* findings of fact and conclusions already reached in its Liability and Costs Hearing decisions, which were undisturbed.

It was explained to the claimant multiple times that the Tribunal had no power to do so.

44. The claimant also referred in his authorities to ***Stuart Harris Associates v Gobhurdun 2023 EAT 145*** in support of his submission that before reaching a finding of dishonesty, this should be put to the party first. The Tribunal had previously rejected that this was a correct and complete proposition of the law when the claimant's application for Reconsideration of the Tribunal's liability Judgment (about 4 years and 6 months out of time) was refused by the Tribunal just before this Hearing. The Tribunal's finding of dishonesty in relation to the claimant at the Liability Hearing was undisturbed and was not pursued or successful on appeal.

45. The claimant also maintained an allegation of dishonesty against Mr Laddie, KC in relation to a letter sent to Ms Nahal's employer during the course of the Liability Hearing. That letter was at 132-133 of the claimant's supplementary Bundle submitted for this Hearing. It remained an improper submission having regard to the Tribunal's previous findings and conclusions in paragraphs 29 and 134 of the Liability Judgment. The Tribunal observes that this was one of four allegations of dishonesty against the respondent's representatives or its witnesses. All appear to be completely baseless.

46. The claimant did not refer to any other document in his supplementary Bundle of 485 pages.

47. The claimant invited the Tribunal to make an Order for the disclosure of a Memory stick. The Tribunal understood this related to the issue of whether or not Ms Nahal had fabricated evidence. The Tribunal responded by stating the time/opportunity to raise the issue of disclosure for the Liability Hearing had long passed and the Tribunal's finding and conclusions about that were set in stone. Mr Laddie, KC informed the Tribunal that the issue of the same memory stick had been the subject of a High Court application by the claimant which had been struck out with Costs awarded against the claimant. The claimant had not volunteered this himself to the Tribunal.

48. The claimant's 39 page skeleton for this Hearing was vastly in excess of the Tribunal's Order to limit the document to 10 pages. The claimant was Ordered to resubmit the document to comply with the Order but he remained in defiance of the Order. The Tribunal allowed the skeleton argument to avoid delay to the Hearing but subject to only having regard to matters of relevance for the Remitted Hearing. The Tribunal read the skeleton and observed that a significant part of it referred to matters already decided, which, once again,

the claimant was attempting to revisit. Once again, there was a persistence in not accepting what had already been determined.

49. The claimant also submitted that he was not obliged to provide a statement of means. The claimant was wrong to say so. He was Ordered to provide a statement of means. The claimant asserted he was a litigant in person against whom substantial costs were being sought. It was explained that this was in fact a potential safeguard as the Tribunal may have regard to a party's ability to pay. The Tribunal had Ordered a statement of means having regard to the amount of costs sought.

50. The respondent asked the Tribunal to note at the Hearing that it was expressly reserving the right to seek its Costs of this Hearing pending promulgation of this Judgment.

**Note:**

Please note that if a Tribunal hearing has been recorded you may request a transcript of the recording, for which a charge may be payable. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings. You can access the Direction and the accompanying Guidance here:

Practice Directions and Guidance for Employment Tribunals (England and Wales) - Courts and Tribunals Judiciary

**Public access to Employment Tribunal decisions**
All judgments and reasons for the judgments are published, in full, online at *www.gov.uk/employment-tribunal-decisions* shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

Approved by

**Regional Employment Judge Khalil**

**7 February 2025**